STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 7183

Petition of Eight Ratepayers for an investigation of possible disclosure of private telephone records without customers' knowledge or consent by Verizon New England Inc., d/b/a Verizon Vermont	)))))

Docket No. 7192

Petition of Vermont Department of Public Service for an investigation into alleged unlawful customer records disclosure by Verizon New England Inc., d/b/a Verizon Vermont	)))))

Docket No. 7193

Petition of Vermont Department of Public Service for an investigation into alleged unlawful customer records disclosure by AT&T Communications of New England, Inc.	))))

Order entered: 7/20/2009

SUMMARY

These dockets concerned investigations of the alleged disclosure of customer information by two Vermont carriers in violation of Vermont law. They were opened in June 2006 in response to a petition filed by eight ratepayers for an investigation of Verizon New England Inc., d/b/a Verizon Vermont ("Verizon") and to two subsequent petitions filed by the Vermont Department of Public Service ("Department") for investigations of Verizon and what is

now AT&T Corp.[1] ("AT&T"). The principal subject of each of the investigations related to allegations that the carriers provided data that enabled the National Security Agency ("NSA") to collect the telephone records of tens of millions of Americans in violation of Vermont privacy standards for the protection of customer records.

Progress in these investigations has been limited from the beginning by the unwillingness of the carriers, based on claims of federal preemption, to provide any information about disclosures of customer information to the NSA, by the assertion of a state-secrets privilege by the federal government, by related litigation in federal courts, and, finally, by the enactment of amendments to the Foreign Intelligence Surveillance Act of 1978[2] ("FISA Amendments") in July 2008.

As we noted in our procedural order of July 18, 2008, section 803[3] of the FISA Amendments appeared to preclude us from investigating any alleged provision of customer information by the carriers to the NSA. In that procedural order, we invited the parties to submit comments on how to proceed in these dockets following enactment of the FISA Amendments. All the parties acknowledged that the FISA Amendments had a significant preemptive effect on these proceedings, although there were differences among the parties in how to proceed.

On June 3, 2009, the United States District Court for the Northern District of California issued an order[4] enjoining our proceedings in these dockets. The federal district court concluded that these proceedings are prohibited by section 803 of the FISA Amendments. In accordance with this federal district court order, we now dismiss these proceedings and close the three dockets. This dismissal is without prejudice to the renewal of these proceedings if constitutional or other legal challenges to section 803 of the FISA Amendments are upheld on appeal of the federal district court's order.

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1. AT&T Corp. is the successor by merger on November 9, 2007, to AT&T Communications of New England, Inc.

2. Foreign Intelligence Surveillance Act of 1978 Amendments Act of 2008, P.L. 110-261 122 Stat 2436.

3. 50 USC § 1885b.

4. In Re: National Security Agency Telecommunications Records Litigation, MDL No. 06-1791 (N.D.CA., June 3, 2009). Judgment in accordance with this order was entered by the district court on June 15, 2009.

The FISA Amendments specifically bar us from imposing any administrative sanction on a carrier for providing assistance to the NSA. The Department recommended that we impose a fine on AT&T in Docket 7193 for its failure to cooperate with legitimate inquiries of the Department not related to AT&T's alleged assistance to the NSA. However, by enjoining these proceedings, the order of the federal district court precludes the imposition of any penalty in these proceedings, even with respect to conduct unrelated to the alleged disclosures of customer information to the NSA.

In dismissing these proceedings, we observe that the allegations contained in the original petitions and, perhaps, even more so, the responses to these allegations by the carriers and the federal government, culminating in the enactment of the FISA Amendments, have had negative consequences in terms of public and consumer trust. In an effort to restore a measure of trust with the public and with customers who are deeply concerned about the conduct alleged in these proceedings, we strongly encourage Verizon and AT&T to provide greater assurance to their customers and the public that any disclosure of customer information, even to a government agency that bases its request on national security grounds, will be made in the future only upon an independent assessment of the legal authority for such action and in accordance with the kind of clear statutory or other legal authority that would be broadly and generally accepted in the legal community.

PROCEDURAL BACKGROUND AND ENACTMENT OF FISA AMENDMENTS

The first petition (Docket 7183) was filed with the Board on May 24, 2006, by eight Vermont customers of Verizon requesting the Board to investigate whether Verizon disclosed protected customer information to the NSA without authority. This complaint followed a news story that millions of private phone records were disclosed to the NSA without the customers'

knowledge or consent. [5] This news report claimed that no warrants had been issued for customer records.[6]

The Department of Public Service ("Department") subsequently filed related petitions on June 21, 2006, for investigations of Verizon (Docket 7192) and AT&T (Docket 7193) regarding the alleged disclosure of telephone calling records and the failure of the carriers to respond adequately to inquiries by the Department pursuant to 30 V.S.A. § 206.

On September 18, 2006, we denied the carriers' motions to dismiss and allowed discovery to proceed in these dockets.[7] By letter dated September 25, 2007, U.S. Deputy Assistant Attorney General Carl J. Nichols informed us that the "United States has formally asserted the state secrets privilege over any statement that would tend to confirm or deny whether call records have been provided to the NSA."

In October of 2006, the United States Department of Justice ("DOJ") filed a lawsuit in federal district court to enjoin these proceedings. In July 2007, the federal district court hearing the case denied the federal government's summary judgment motion.[8] The denial was made without prejudice to renewal of the government's motion following a federal appellate court decision in a separate case involving similar claims of a state-secrets privilege.[9] Following a period of inactivity, we reactivated these dockets and allowed limited discovery to proceed by

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5. "NSA has a massive database of Americans' phone calls."USA Today, May 11, 2006. Exh. B to Petition of Eight Ratepayers in Docket 7183.

6. *See* Exh. B to Petition of Eight Ratepayers in Docket 7183.

7. *See* Docket No. 7183/7192, Order of 9/18/06; Docket No. 7193, Order of 9/18/06.

8. *In Re National Security Agency Telecommunications Records Litigation*, 2007 WL 2127345 (ND Cal 2007). The lawsuit to enjoin these proceedings (*United States v. Volz, et al.*, C07-1396), together with cases from other jurisdictions, was transferred to the United States District Court for the Northern District of California by the Judicial Panel on Multidistrict Litigation on February 15, 2007.

9. *Hepting v. AT&T Corp.*, 439 F. Supp. 2d 974 (ND Cal 2006). The United States Court of Appeals for the Ninth Circuit heard oral arguments on the appeal in *Hepting* on August 15, 2007, but it had not issued a decision as of the date the FISA Amendments were enacted on July 10, 2008. By order dated August 21, 2008, the Ninth Circuit subsequently remanded *the Hepting* case to the district court for further consideration in view of the FISA Amendments.

our order of October 31, 2007 ("October Order"). On December 14, 2007, we issued an order suspending the discovery schedule.[10]

The enactment of the FISA Amendments on July 10, 2008 prompted our Procedural Order of July 18, 2008, in which we invited comments and motions from the parties about how to proceed in these matters. Sec. 803(a) of the FISA Amendments provides as follows:

> (a) In General- No State shall have authority to–
> (1) conduct an investigation into an electronic communication service provider's alleged assistance to an element of the intelligence community;
> (2) require through regulation or any other means the disclosure of information about an electronic communication service provider's alleged assistance to an element of the intelligence community;
> (3) impose any administrative sanction on an electronic communication service provider for assistance to an element of the intelligence community; or
> (4) commence or maintain a civil action or other proceeding to enforce a requirement that an electronic communication service provider disclose information concerning alleged assistance to an element of the intelligence community.

The FISA Amendments define "State" specifically to include any state public service commission.[11] Assistance is defined in Sec. 801(1) as "the provision of, or the provision of access to, information (including communication contents, communications records, or other information relating to a customer or communication), facilities, or another form of assistance." Intelligence community, as defined in the FISA Amendments, includes the NSA.[12]

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10. We suspended the discovery schedule pending a ruling on the Department's motion of November 7, 2007, for clarification and modification of the allowable scope of discovery in these dockets ("Motion to Clarify"). There were two pending motions before us at the time the discovery schedule was suspended: (1) the Motion to Clarify; and (2) a motion filed on May 18, 2007, by petitioner Michael Bandler ("Motion to Compel") in Docket 7183 to compel discovery by Verizon. AT&T and Verizon both filed oppositions to the Motion to Clarify on November 13, 2007. AT&T filed supplemental opposition to the Motion to Clarify on November 29, 2007. Verizon filed an opposition to the Motion to Compel on June 4, 2007. Mr. Bandler filed a reply to Verizon's opposition on June 14, 2007. In compliance with our October Order, Verizon filed a revised opposition to the motion to compel on November 14, 2007.

11. "The term 'State' means any State, political subdivision of a State . . . and includes any officer, public utility commission, or other body authorized to regulate an electronic communication service provider." Sec. 801(9) of FISA Amendments.

12. "The term 'Intelligence Community' has the meaning given the term in section 3(4) of the National Security Act of 1947 (50 U.S.C. 401a(4))." Section 801(7) of the FISA Amendments.

COMMENTS BY THE PARTIES

In response to our Procedural Order of July 18, 2008, we received responses from Verizon on August 7, 2008, from the Department, AT&T and ACLU-VT on August 8, 2008, and from Michael Bandler on August 14, 2008.[13] AT&T filed a reply on August 21, 2008, to the Department's recommendation that we impose a fine on AT&T, and the Department responded to AT&T's reply on August 25, 2008. A summary of the comments and recommendations provided by the parties in response to our Procedural Order is below.

The Department

The Department stated that it had reluctantly concluded that the FISA Amendments appear to preclude further investigation into the activities which initially gave rise to these proceedings. The Department noted that both Verizon and AT&T ultimately produced information on all disclosures of consumer information that would not be preempted by the FISA Amendments, and that it is likely that all their non-security related disclosures of customer information were compliant with Vermont laws and regulations. Accordingly, the Department did not believe that there was currently a basis for continuing the investigations. The Department noted that there are legal challenges to the FISA Amendments and requested that any disposition of this proceeding be made without prejudice to the ability of the Department or any other party to re-file.

The Department recommended, however, that we fine AT&T pursuant to our authority under 30 V.S.A. Secion 30 in the amount of $13,000 because of AT&T's refusal to answer inquiries by the Department unrelated to the alleged provision of customer information to the NSA. The Department noted that AT&T refused for several months to produce any information in response to the Department's information requests under Section 206, even though many were clearly not related to national security matters. It contrasted the non-responsive approach of AT&T to that of Verizon, which fully answered inquiries that were unrelated to security matters.

13. ACLU-VT and Michael Bandler were two of the ratepayer petitioners in Docket 7183.

Verizon

Verizon maintained that the proceedings should be terminated because the FISA Amendments foreclose any investigation into allegations that Verizon provided assistance to the NSA, the subject of the petitions that launched this investigation. Verizon also noted that because Verizon no longer provides landline telephone service in Vermont following the sale of this business to FairPoint Communications, there is no longer any reason to inquire into its disclosure practices.

AT&T

AT&T also took the position, in light of the FISA Amendments, that the proceeding involving it must now be dismissed and the docket closed. With respect to the Department's recommendation that it be fined, AT&T argued, among other things, that it had not engaged in any behavior that would warrant sanctions and that the Department's recommendation was not timely. It argued that it had acted in good faith and with candor prior to and throughout the proceeding.

ACLU-VT

ACLU-VT agreed that the FISA Amendments precluded further proceedings on the provision of customer information to the National Security Agency. ACLU-VT recommended that we discontinue these dockets without prejudice on the condition that all telecommunications companies under our jurisdiction report all disclosures of customer information they have made that are covered by Vermont statutes and Board rules aimed at safeguarding customer privacy.

Michael Bandler

Mr. Bandler requested that, before closing the dockets, we should resolve pending motions by him and the Department and consider more comprehensive disclosure standards to replace "the standard 'disclosure as required by law' language now in use." He requested that any dismissal of the proceedings should be without prejudice to renewal given the pending legal challenges to the FISA Amendments.

THE FEDERAL DISTRICT COURT ORDER

On June 3, 2009, the United States District Court for the Northern District of California issued an order[14] ("District Court Order") in which it concluded that the proceedings in these dockets "are prohibited by section 803 [of the FISA Amendments] and are hereby enjoined pursuant to this court's authority under that statute."[15] The District Court Order was issued in connection with the lawsuit filed in October 2006 by the DOJ to enjoin these proceedings.

The same federal district court had previously denied the DOJ's motion for summary judgment on July 24, 2007, based in part on its holding that these proceedings were not preempted by any federal statute. Following the enactment of the FISA Amendments, the DOJ filed a new motion for summary judgment on December 23, 2008, which the district court granted on the basis of the express statutory preemption of our authority now provided by the FISA Amendments.

In its decision, the district court rejected constitutional and other legal challenges to section 803 of the FISA Amendments. Of particular note in the context of these proceedings, which have involved inquiries about disclosures of customer information to parties that are not part of the intelligence community as well as the alleged disclosures to the NSA, is the conclusion of the district court that these proceedings are enjoined in their entirety even as to investigatory inquiries that are not prohibited by section 803 of the FISA Amendments.

> The court also agrees with the United States that the appropriate remedy is to enjoin all of the investigations at issue in these cases. The documents submitted to the court leave no doubt that all of the investigations were initiated for the purpose of delving into alleged electronic surveillance activities initiated by the NSA. While it is true that some of the individual questions propounded in each inquiry do not directly concern national security, the remedy proposed by the states – suppressing only those that make mention of national security topics while allowing the rest to go forward – would be a pointless exercise that is not without substantial cost both to the telecommunications companies affected and to the states themselves. More importantly, the "parsing" of the interrogatories requested by the states does not appear to be the role for the federal courts that Congress envisioned in enacting section 803. Section 803(a)'s prohibition on

14. In Re: National Security Agency Telecommunications Records Litigation, MDL No. 06-1791 (N.D.CA., June 3, 2009).

15. Ibid. at 21.

> "conducting an investigation into an electronic communication service provider's alleged assistance to an element of the intelligence community," is broader than barring certain questions. There is simply no getting around the fact that the purpose of each of the state proceedings at issue in these cases was and is to find out about the telecommunications companies' cooperation with an "element of the intelligence community."
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> As the United States has stated herein, should any state launch a new investigation not prompted by events or allegations prohibited by section 803 to which the facially innocuous interrogatories and information requests herein are relevant, nothing bars the state from propounding those very questions in that new inquiry. In this context, however, even the "innocuous" interrogatories and information requests must be enjoined.[16]

DISCUSSION

Under Vermont law, customers of Vermont telecommunications providers have a privacy right in controlling the release of information about themselves and their calling patterns.[17] This requirement was incorporated into a Board Order in 1999 that was binding on both Verizon and AT&T before it was adopted as a rule of the Board.[18] In addition, Board Rule 7.608(A) requires telecommunications providers "to take reasonable care to protect the privacy interests of customers" and to file a privacy analysis with the Board before implementing "a technology change that may affect privacy interests of customers."[19]

In these proceedings, we have been concerned only with whether Verizon and AT&T engaged in conduct that violated their obligations under Vermont law to protect the privacy of

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16. In Re: National Security Agency Telecommunications Records Litigation, MDL No. 06-1791 (N.D.CA., June 3, 2009) at 19.

17. Board Rule 7.605(A)(10) provides that Vermont telecommunications consumers have a "right to privacy by controlling the release of information about oneself and one's calling patterns and by controlling unreasonable intrusions upon privacy."

18. In a proceeding in 1999, the Board ordered Vermont telecommunications providers, including the legal predecessors of Verizon and AT&T, to comply with the Consumer Bill of Rights, including the privacy standard now set forth in Rule 7.605(A)(10). Order in Docket 5903, "Investigation into Service Quality Standards, Privacy Protections and Other Consumer Privacy Safeguards for Retail Telecommunications Service," July 2, 1999, at 116 and Attachment 2 to Order.

19. The carriers have also established and made public their own customer privacy standards. The ratepayer petitioners in Docket 7183 assert that Verizon may have violated customer protection standards requiring fair marketing practices as the alleged behavior may be inconsistent with the privacy assurances Verizon provided to its customers.

customer information. What is not our concern is the existence or non-existence of an NSA calling records program, how the NSA may have used such calling records or whether the NSA itself acted lawfully. The central question in these investigations has been whether Verizon or AT&T made protected customer information available to the NSA without appropriate legal authority.

It is apparent, however, that the FISA Amendments preclude us from conducting any further investigation into whether Verizon and AT&T complied with Vermont privacy standards in their handling of protected customer information insofar as it relates to the provision of customer information or other assistance to the NSA. The FISA Amendments expressly removed our authority to investigate "the provision of, or the provision of access to, information (including communication contents, communications records, or other information relating to a customer), facilities or another form of assistance" to the NSA by Verizon and AT&T.[20] We are also barred from requiring any disclosure about such matters or imposing any administrative sanction on Verizon or AT&T for any assistance rendered to the NSA (regardless of the legality of such assistance).[21]

Although this proceeding has included discovery about disclosures of customer information generally as well as the alleged NSA disclosures, the District Court Order makes it clear that we must dismiss these proceedings, even to the extent they relate to non-NSA disclosures,[22] and close the three dockets. Our dismissal of these proceedings is without prejudice to their renewal in the event constitutional or other legal challenges to section 803 are upheld on appeal of the District Court Order or in another proceeding.

In its comments supporting the discontinuance of these dockets without prejudice, ALCU-VT also suggested we require all telecommunications companies under our jurisdiction to

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20. Sec. 803(a)(1) and Sec. 801(1) of the FISA Amendments.

21. Sec. 803(a)(2) and (3) of the FISA Amendments.

22. *See* pages 8-9 above. A new docket could be opened to investigate disclosures of customer information to persons other than elements of the intelligence community. In this regard, however, we note that the Department is satisfied with the information provided by the carriers with respect to non-NSA related disclosures of customer information and believes that such unrelated disclosures likely complied with Vermont law.

report all disclosures of customer information that are covered by Vermont statutes and Board rules aimed at safeguarding customer privacy. We will consider adopting such a requirement in an appropriate rule-making proceeding in the future, particularly if questions remain about whether companies subject to our jurisdiction are complying with our rules and the Consumer Bill of Rights. We note, however, that requiring the reporting of disclosures of customer information to elements of the intelligence community would presumably be barred by Sec. 803 (a)(2) of the FISA Amendments, so we might only be able to require the reporting of other disclosures of customer information. In this regard, we would need to consider the Department's conclusion that the carriers' disclosures of customer information in these other areas appear compliant with Vermont law when assessing the relative costs and benefits of imposing additional reporting requirements on telecommunication carriers subject to our jurisdiction..

While apparently acknowledging the preemption of our investigatory authority by the FISA Amendments as it relates to alleged disclosures of customer information to the NSA, Mr. Bandler requested that we rule on pending motions by him and the Department. It was his view that responsive answers to certain of his interrogatories would not be barred by the FISA Amendments. The District Court Order makes it clear that we have no authority to rule on these pending motions or to require responsive answers to certain of his interrogatories, even as to matters not specifically barred by the FISA Amendments. Therefore, we do not issue any ruling on these motions in this order.

Mr. Bandler also asked us to consider the adequacy of the notices the carriers provide to the public and their customers and to consider more comprehensive public notice standards that would more completely address the circumstances under which customer information may be disclosed than is provided by "the standard 'disclosure as required by law' language now in use." We are uncertain as to what a more comprehensive public and customer notice might include and note that the FISA Amendments may impose limitations on our ability to require more comprehensive public and customer notices as to certain matters. Nevertheless, in an appropriate rule-making proceeding in the future, we would be willing to consider the adequacy of the current public notices provided by Vermont carriers to customers and the public about the circumstances under which customer information may be disclosed to third parties and about

limitations on the Board's jurisdiction to investigate and sanction alleged violations of Vermont law in certain instances under the FISA Amendments.

While concluding that these proceedings are largely preempted by the FISA Amendments, the Department nevertheless recommended that we fine AT&T $13,000 in Docket 7193 due to AT&T's refusal to answer inquiries by the Department unrelated to the alleged provision of customer information to the NSA. The Department noted that AT&T for several months, from May 17, 2006, until October 2, 2006 (following our order of September 21, 2006), did not produce any specific information in response to the Department's information requests under Section 206 of Title 30, even though many were clearly not related to the national security matters. In its response of May 25, 2006, to the Department inquiries, AT&T simply maintained that AT&T does not provide customer information to law enforcement authorities or government agencies without legal authorization and that it could not comment on matters of national security. The Department contrasted the non-responsive approach of AT&T with that of Verizon, which fully answered inquiries that were unrelated to national security matters.

AT&T is subject to a legal obligation to provide information the Department legitimately requests under 30 V.S.A. § 206. Any failure to provide such information frustrates and obstructs the Department's ability to perform its fundamental functions and responsibilities. Neither AT&T's subsequent compliance with our order to provide such information, nor any conclusion that such information (once provided) provided no evidence of misconduct, repairs AT&T's earlier failure to provide such information upon request of the Department. After reviewing the record and the filings of the Department and AT&T on the issue of sanctions, it is clear that AT&T should have responded to the Department's legitimate information requests that were not related to national security matters. Nevertheless, the terms and reasoning of the District Court Order enjoining these proceedings now bar the imposition of any penalty against AT&T in Docket 7193.

Our acknowledgment that the FISA Amendments and the District Court Order remove our authority in this matter and require the closure of these dockets cannot hide our discomfort at the possibility that customer information was disclosed without an appropriate legal basis. Developments in and affecting these proceedings have raised serious concerns that we hope, if

we were aware of all the facts, would be less justified than we may fear. These proceedings have touched upon several core principles of our constitutional democracy, including the rule of law, federalism, separation of powers, the right to redress grievances in judicial and administrative proceedings, governmental transparency and privacy rights.

We respect and value the efforts of the NSA and other intelligence agencies to keep us and other Americans secure. Although we have no special competence in assessing national security or secrecy claims of the government, we do have a significant responsibility in ensuring that companies under our jurisdiction comply with Vermont privacy rules, that the legitimate privacy interests of Vermont customers of telecommunications carriers are protected, and that the appropriate balance between the privacy and security interests of the public is achieved. With the enactment of the FISA Amendments and the limitations on our ability to investigate alleged violations of state law by companies under our jurisdiction, we are also concerned that the complainants in these proceedings will find no forum to investigate their allegations and address their legal rights.[23]

One example of the developments that have concerned us during the course of these proceedings is the assertion of an expanded state secrets privilege by DOJ. We can not help but be troubled by the increasing number[24] and currently broad nature[25] of state secrecy privilege claims[26] and the amount of unexamined deference[27] that may be accorded to state secret

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23. We note that the FISA Amendments remove our authority to investigate certain alleged violations of Vermont privacy rules, but do not preempt Vermont privacy rules applicable to Vermont carriers. Unless another source of preemption of Vermont privacy protections exists (an argument that was rejected in the earlier order by the federal district court in July 2007), it would appear that Vermont carriers are still subject to those rules even with respect to any assistance the carriers may render to the NSA or other intelligence agencies.

24. According to the Reporters Committee for Freedom of the Press, in the first four years after September 11, 2001, the state secrets privilege was invoked 23 times, while in the prior half-century, the privilege was invoked only 55 times. "Secrecy Privilege Invoked in Fighting Ex-Detainee's Lawsuit", Washington Post (May 13, 2006, p. A-3).

25. Until relatively recently, the state secrets privilege was asserted as a bar to certain discovery, but generally not as a total bar to a lawsuit. In essence, the privilege is being transformed from a narrow evidentiary privilege in civil suits against the government to a much broader immunity doctrine. *See* Lanman, Henry "Secret Guarding: The new secrecy doctrine so secret you don't even know about it," Slate (May 22, 2006, http://www.slate.com/id/2142155/).

26. The existence of a state secrets privilege was recognized in *United States v. Reynolds*, 345 U.S. 1 (1953). That case involved a civil claim for negligence against the government under the Federal Tort Claims Act, enacted in 1946, stemming from the 1948 crash of a B-29 aircraft. The court majority concluded (with Justices Black,

(continued...)

privilege declarations by national security officials in the executive branch whose principal concern is, understandably, the nation's security, and not on finding the appropriate balance with competing legal rights and the interests of individual citizens. It would be counter-intuitive if the federal executive branch were allowed to toss aside citizens' constitutional protections in the name of preserving those same protections.

The closure of these dockets, in response to the enactment of the FISA Amendments, will not eliminate the continuing concerns of Vermont consumers of telecommunications services about the privacy of their calling information and other records. In fact, by precluding investigation of any possible prior or future disclosure of this information to the NSA, the FISA Amendments likely heighten these concerns. We fear that the unfortunate consequence of these developments has been to invite greater distrust and cynicism about both telecommunications carriers and our government and its processes. For these reasons, we believe the carriers and the federal government have a strong interest in ameliorating these concerns or, at least, providing greater clarity to customers and the public than has been provided so far. We sincerely hope that these continuing concerns are addressed forthrightly by the carriers, and, if not, by Congress, the executive branch and the federal courts.

We note that, during the course of these proceedings, Verizon and AT&T have each issued public assurances that they would take no action to provide customer information without

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26. (...continued)
Frankfurter and Jackson dissenting) that assertions of state secrets privilege by the Secretary of the Air Force "under circumstances indicating a reasonable possibility that military secrets were involved" constituted a sufficient showing of the privilege's applicability. *Reynolds* at 10-11. Untested deference to an assertion of a state secrets privilege seems more understandable in the context of a civil negligence action against the government, which, without the recently enacted statutory exception provided by the Federal Tort Claims Act, would have been barred by the centuries-old, common law doctrine of sovereign immunity, than it might be in an investigation of a private telecommunications company by a state agency.

27. According to one academic study, "courts have examined the documents' underlying claims of state secrecy fewer than one-third of the times it has been invoked" and have only rejected "the assertion of the privilege four times since 1953." Lanman, op. cit. As has often been observed, deference to broad claims of state secrecy, without examining the underlying basis for such claims, invites abuse and may allow officials to shield embarrassing or illegal conduct rather than truly sensitive information. *United States v. Reynolds*, the leading Supreme Court case on the state secrets privilege, seems to provide an example of this. *See* "An Injustice Wrapped In A Pretense; In '48 Crash, the U.S. Hid Behind National Security", Washington Post (June 22, 2003, p. B-3).

legal authority. Verizon[28] and AT&T[29] also both filed documents with us in which they state they would not disclose customer information without legal authorization.

From these assurances, one might reasonably conclude that either the carriers did not make the calling records of millions of customers generally available to the NSA or they did so with legal authority that the carriers deemed sufficient at the time such access was provided. We take far more comfort in the first alternative than in the second. This is because we are not aware of, nor has any party to these proceedings pointed to, any legal authority that would permit the carriers to provide access to the calling records of millions of customers for the use of the NSA in contravention of laws protecting the privacy of such information.

In looking to the future, with these concerns in mind, we would strongly encourage Verizon and AT&T, at the earliest opportunity, to provide additional assurance to their customers that any disclosure of customer information, even to a government agency that bases its request on national security grounds, will only be made in the future upon an independent assessment of the legal authority for such action and in accordance with the kind of clear statutory or other legal authority that would be broadly and generally accepted in the legal community.[30]

Such an undertaking could provide some assurance to their customers, for example, that the carriers will only provide access to protected customer information in the future when there is clear legal authority for such action – and not, for instance, as has been alleged by some, solely upon assurances by government officials that the provision of such information is legal. In addition, it would be reassuring for their customers and the public to know that Verizon and AT&T do not now share the expansive view of a small number of former executive branch

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28. In a letter dated May 26, 2006 to Commissioner David O'Brien of the Department, Bruce P. Beausejour, Vice President and General Counsel of Verizon writes:

> As Verizon has also made clear, to the extent it provides assistance to the government for national security or other purposes, it "will provide customer information to a government agency only where authorized by law for appropriately-defined and focused purposes."

29. By letter dated May 25, 2006 to Commissioner O'Brien, Jay E. Gruber, an attorney for AT&T states:

> I want to make it clear that AT&T does not give customer information to law enforcement authorities or government agencies without legal authorization. . . . If and when AT&T is asked by a government agency for assistance, we do so strictly within the law.

30. Furthermore, if Verizon or AT&T believe there currently exists statutory or other legal authority that would permit the general provision of customer records to the NSA, it would be helpful if they would disclose the specifics of such authority.

lawyers and constitutional scholars that the President has extraordinary powers under Article II of the Constitution that supercede existing law when national security is involved. By these measures, Verizon and AT&T may at least restore a measure of trust and provide some level of assurance, or at least greater clarity, to Vermont telecommunications customers as to the circumstances, if any, under which the carriers believe they would be legally justified to make customer calling records and related information generally available to the NSA.

ORDER

IT IS HEREBY ORDERED, ADJUDGED AND DECREED by the Public Service Board of the State of Vermont that the petitions in Dockets 7183, 7192 and 7193 are hereby dismissed without prejudice to their renewal upon the ultimate resolution of pending legal challenges to the FISA Amendments, and the proceedings in each of these dockets shall be closed.

Dated at Montpelier, Vermont, this 20th day of July, 2009.

s/ James Volz)
)
) PUBLIC SERVICE
)
s/ David C. Coen) BOARD
)
) OF VERMONT
s/ John D. Burke)

OFFICE OF THE CLERK

FILED: July 20, 2009

ATTEST: s/ Susan M. Hudson
Clerk of the Board

NOTICE TO READERS: This decision is subject to revision of technical errors. Readers are requested to notify the Clerk of the Board (by e-mail, telephone, or in writing) of any apparent errors, in order that any necessary corrections may be made. (E-mail address: psb.clerk@state.vt.us)

Appeal of this decision to the Supreme Court of Vermont must be filed with the Clerk of the Board within thirty days. Appeal will not stay the effect of this Order, absent further Order by this Board or appropriate action by the Supreme Court of Vermont. Motions for reconsideration or stay, if any, must be filed with the Clerk of the Board within ten days of the date of this decision and order.